



**DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS**



In the matter of:)	
)	
)	ISCR Case No. 10-05860
)	
Applicant for Security Clearance)	

Appearances

For Government: Caroline H. Jeffreys, Esq., Department Counsel
For Applicant: *Pro se*

09/17/2012

Decision

LAZZARO, Henry, Administrative Judge

Applicant mitigated the security concerns that arise from his history of drug abuse and criminal conduct. However, he failed to mitigate the concern that arises from the false answers he deliberately provided in security clearance applications he submitted in June 2004 and January 2010. Clearance is denied.

On April 4, 2012, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to Applicant stating it was unable to find it is clearly consistent with the national interest to grant or continue a security clearance for Applicant.¹ The SOR alleges security concerns under Guidelines H (drug involvement), J (criminal conduct), and E (personal conduct). Applicant submitted an undated response to the SOR. It was unclear from Applicant's response which allegations he admitted and which he denied. At the hearing it was clarified that he admitted all allegations except SOR subparagraphs 1.c and 2.e. Applicant requested a hearing.

¹ This action was taken under Executive Order 10865, DoD Directive 5220.6, dated January 2, 1992, as amended (Directive), and adjudicative guidelines which became effective within the Department of Defense for SORs issued after September 1, 2006.

The case was assigned to me on July 18, 2012. A notice of hearing was issued on August 2, 2012, scheduling the hearing for August 21, 2012. The hearing was conducted as scheduled. The government submitted eight documentary exhibits that were marked as Government Exhibits (GE) 1-8 and admitted into the record without objection. Applicant testified and submitted four documentary exhibits that were marked as Applicant Exhibits (AE) 1-4 and admitted into the record without objection. The record was held open to provide Applicant the opportunity to submit additional documents in support of his case. One document was received, marked as AE 5, and admitted into the record without objection. Department Counsel's forwarding memorandum was marked as Appellate Exhibit (App. Ex.) I, and is included in the file. The transcript was received on September 5, 2012.

Procedural Issues

At the hearing, Department Counsel moved to amend SOR subparagraphs 2.a and 2.b. (Tr. p. 60-62) Those amendments were made on the face of the SOR without objection.

Findings of Fact

Applicant's admissions to the allegations in the SOR are incorporated herein. In addition, after a thorough review of the pleadings, testimony, and exhibits, I make the following findings of fact:

Applicant is a 35-year-old man who has been employed as a simulator technician by a defense contractor since November 2009. He worked for a different defense contractor as an avionics armament technician from June 2004 until August 2008. He was unemployed from August 2008 until November 2009.

Applicant either graduated from high school or obtained a General Educational Development (GED) certificate in 1995. He enlisted in the Army in 1997, but received an entry level separation after several weeks of training due to physical limitations. He attended an aviation college from January 2001 until December 2003, when he received an associate's degree in avionics technology. Applicant is single and has no dependents.

Applicant was charged with Driving Under the Influence (DUI) in July 2009. His blood alcohol concentration (BAC) was 0.08. He pled guilty to the offense and was fined \$600 and ordered to attend a Level 1 alcohol and drug class. Additionally, his driving privileges were revoked for 90 days. Applicant successfully completed the terms of his sentence.

Applicant was again charged with DUI In April 2000. He pled guilty to this offense in September 2004, and was sentenced to 12 months confinement and fined \$1,200 plus costs. The sentence was suspended for two years with unspecified conditions.

Applicant was arrested in September 2004, and charged with Unlawful Delivery of a Controlled Substance. According to Applicant, the offense actually occurred in 2002 when his girlfriend sold marijuana to some people without his knowledge. Upon being arrested, Applicant was given the opportunity to cooperate with the police in other narcotics

investigations in return for a reduced sentence. He provided the cooperation, and was allowed to plead guilty to a reduced charge of Unlawful Possession of a Controlled Substance. He was sentenced to a pretrial diversion program, fined \$2,000, and ordered to attend a Level 2 drug and alcohol class. Since being sentenced, Applicant has attended unrelated inpatient and outpatient drug programs and participated in a multi-year methadone program. Those events appear to be the reason he did not complete the pretrial diversion program until July 24, 2012. Applicant anticipates the charges will be dismissed when he returns to court in September 2012.

Applicant began using marijuana in or about 1993, while he was still in high school. He estimates he used it a few times a month until he quit in June 2006. He testified he used cocaine a total of about eight or nine times between 2000 and 2008. He has purchased both marijuana and cocaine. He was prescribed Lortab, which he abused by ingesting it more frequently than was prescribed. He injected Dilaudid regularly over about a three month period. He has also abused Hydrocodone, Demerol, and ecstasy.

Applicant tested positive for cocaine in a urinalysis conducted while he was employed by a defense contractor on board an Army base in 2004. He was placed on unpaid leave and required to attend an Intensive Outpatient Program (IOP) through an employee assistance program. The discharge summary from the program disclosed that he reported his alcohol use to consist of drinking 12 beers at a time about three days a week. He also reported he had used cocaine on and off since he was 17 years old. Applicant's final DSM-IV discharge diagnoses, made by a physician, included: Alcohol Abuse, full early remission, and Cocaine Abuse, in full early remission. His prognosis was deemed to be good.

Applicant returned to the same treatment facility in January 2006, seeking treatment for opioid dependency. He claimed to be spending about \$500 a week on illegal drugs. He reported his history of drug abuse to consist of Diladid daily for the preceding eight months, Lortab three or four times per week, Demerol once every two weeks, marijuana three times per week, and cocaine a total of four or five times. Applicant reported his dependency as severe.

From 2006 until 2010, Applicant participated in a prescribed methadone regimen. He eventually concluded methodone was just a substitute drug, stopped using it, and he was discharged from the program on November 29, 2010. Applicant has not used an unprescribed controlled substance since he last used cocaine in 2008. He attends Narcotics Anonymous (NA) meetings on a fairly regular basis. Applicant submitted letters from co-workers who expressed their opinions that he possesses exceptionally good character and is an honest and hardworking person.

Applicant submitted a security clearance application on June 8, 2004, in which he falsely answered "No" to questions asking about his arrest history for drug and alcohol offenses, and his history of illegal drug use. He submitted another security clearance application on January 5, 2010, in which he answered "Yes" to a question inquiring about his arrest history for drug and alcohol offenses, but only disclosed a single DUI arrest, which he reported as having occurred in July 1998. In that same security clearance application, he falsely answered "No" to a question inquiring about his history of illegal drug

use in the preceding seven years. Applicant testified he provided the false answers because he was embarrassed about his abuse of drugs, did not understand how important it was to be completely candid, and to protect his employment prospects. (Tr. 55)

Applicant was interviewed by an investigator from the Office of Personnel Management (OPM) on January 25, 2010. At that time, he claimed he began smoking marijuana when he was about 18 or 19 years old, and quit using it when he was 23 years old. He told the investigator he began using cocaine when he was about 23 or 24 years old, and discontinued using it when he tested positive for the substance in the 2004 urinalysis.

Policies

The Directive sets forth adjudicative guidelines to consider when evaluating a person's eligibility to hold a security clearance. Chief among them are the disqualifying conditions and mitigating conditions for each applicable guideline. Each clearance decision must be a fair and impartial decision based upon the relevant and material facts and circumstances, the whole-person concept, and the factors listed in ¶ 6.3.1 through ¶ 6.3.6 of the Directive. Although the presence or absence of a particular condition or factor for or against clearance is not outcome determinative, the adjudicative guidelines should be followed whenever a case can be measured against this policy guidance. Guidelines H (drug involvement), J (criminal conduct), and E (personal conduct) with their disqualifying and mitigating conditions, are most relevant in this case.

The sole purpose of a security clearance decision is to decide if it is clearly consistent with the national interest to grant or continue a security clearance for an applicant.² The Government has the burden of proving controverted facts.³ The burden of proof in a security clearance case is something less than a preponderance of evidence,⁴ although the Government is required to present substantial evidence to meet its burden of proof.⁵ "Substantial evidence is more than a scintilla, but less than a preponderance of the evidence."⁶ Once the Government has met its burden, the burden shifts to an applicant to present evidence of refutation, extenuation, or mitigation to overcome the case against him.⁷ Additionally, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision.⁸

² ISCR Case No. 96-0277 (July 11, 1997) at 2.

³ ISCR Case No. 97-0016 (December 31, 1997) at 3; Directive, Enclosure 3, Item E3.1.14.

⁴ *Department of the Navy v. Egan* 484 U.S. 518, 531 (1988).

⁵ ISCR Case No. 01-20700 (December 19, 2002) at 3 (citations omitted).

⁶ ISCR Case No. 98-0761 (December 27, 1999) at 2.

⁷ ISCR Case No. 94-1075 (August 10, 1995) at 3-4; Directive, Enclosure 3, Item E3.1.15.

⁸ ISCR Case No. 93-1390 (January 27, 1995) at 7-8; Directive, Enclosure 3, Item E3.1.15.

No one has a right to a security clearance⁹ and “the clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials.”¹⁰ Any reasonable doubt about whether an applicant should be allowed access to classified information must be resolved in favor of protecting national security.¹¹

Analysis

Guideline J, Criminal Conduct

Criminal activity creates doubt about a person’s judgment, reliability, and trustworthiness. By its very nature, it calls into question a person’s ability or willingness to comply with laws, rules and regulations. (AG 30)

Applicant was twice convicted of DUI. He was charged with Unlawful Distribution of a Controlled Substance, but, due to cooperation he provided police, was only convicted of Unlawful Possession of a Controlled Substance. DC 31(a): *a single serious crime or multiple lesser offenses*; and DC 31(c): *allegation or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted or convicted* apply.

Accepting Applicant’s assertion that the controlled substance offense actually occurred in 2002, it has been about ten years since he is alleged to have committed an offense. It has been over four years since he illegally possessed a controlled substance. He recently completed the pretrial diversion program to which he was referred, and the lengthy delay in completing that program apparently was due to the multiple treatment programs in which Applicant participated. He continues to regularly attend NA meetings, has established a very good reputation at work, has remained gainfully employed in a responsible position for several years, and has demonstrated that he is committed to living a law-abiding and drug-free lifestyle.

The following mitigating conditions apply: MC 32(a): *so much time has elapsed since the criminal behavior happened, or it happened under such unusual circumstances that it is unlikely to recur and does not cast doubt on the individual’s reliability, trustworthiness, or good judgment*; and MC 32(d): *there is evidence of successful rehabilitation; including but not limited to the passage of time without recurrence of criminal activity, remorse or restitution, job training or higher education, good employment record, or constructive community involvement*.

Guideline H, Drug Involvement

Use of an illegal drug or misuse of a prescription drug can raise questions about an individual’s reliability and trustworthiness, both because it may impair judgment and

⁹ *Egan*, 484 U.S. at 528, 531.

¹⁰ *Id.* at 531.

¹¹ *Egan*, Executive Order 10865, and the Directive.

because it raises questions about a person's ability or willingness to comply with laws, rules, and regulations. (Adjudicative Guideline [AG] 24)

Applicant abused prescribed and non-prescribed controlled substances between 1993 and 2008. He has purchased marijuana and cocaine. He tested positive for cocaine in a work-administered urinalysis. He participated in inpatient and outpatient drug programs, including a multi-year methodone program. He was diagnosed as a cocaine abuser by a physician. Disqualifying Conditions (DC) 25(a): *any drug abuse*; DC 25(b): *testing positive for illegal drug use*; DC 25(c): *illegal drug possession, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession of drug paraphernalia*; and DC 25(d): *diagnosis by a duly qualified medical professional (e.g., physician, clinical psychologist, or psychiatrist) of drug abuse or drug dependence* all apply.

It has been over four years since Applicant last abused a controlled substance and about six years since he completed inpatient drug treatment. He participated in a multi-year methodone program, which he left after realizing he was just substituting one controlled substance for another. Applicant regularly attends NA meetings. He has established a reputation for possessing good character, and being an honest and hardworking individual. He successfully completed a pretrial diversion program in July 2012. Applicant has demonstrated that he is committed to remaining drug free and is utilizing the services available to him to maintain a drug-free lifestyle.

Accordingly, the following Mitigating Conditions (MC) apply: MC 26(a): *the behavior happened so long ago, was so infrequent, or happened under such circumstances that it is unlikely to recur or does not cast doubt on the individual's current reliability, trustworthiness, or good judgment*; MC 26(b): *a demonstrated intent not to abuse any drugs in the future, such as: (1) disassociation from drug-using associates and contacts; (2) changing or avoiding the environment where drugs were used; (3) an appropriate period of abstinence; (4) a signed statement of intent with automatic revocation of clearance for any violation*; and MC 26(d): *satisfactory completion of a prescribed drug treatment program, including but not limited to rehabilitation and aftercare requirements, without recurrence of abuse, and a favorable prognosis by a duly qualified medical professional.*

Guideline E, Personal Conduct

Conduct involving questionable judgment, lack of candor, dishonesty, or unwillingness to comply with rules and regulations can raise questions about an individual's reliability, trustworthiness, and ability to protect classified information. Of special interest is any failure to provide truthful and candid answers during the security clearance process or any other failure to cooperate with the security clearance process. (AG 15)

Applicant deliberately provided false answers in the security clearance applications he submitted in June 2004 and January 2010. Although not alleged in the SOR, he also provided false information when he was interviewed by an OPM investigator about when he stopped using both marijuana and cocaine. DC 16(a): *deliberate omission, concealment, or falsification of relevant facts from any personnel security questionnaire, personal history statement, or similar form used to conduct investigations, determine employment*

qualifications, award benefits or status, determine security clearance eligibility or trustworthiness, or award fiduciary responsibilities applies.

Applicant admits he deliberately provided false information in the security clearance applications he submitted. His reasons for providing false information were to avoid embarrassment, to protect his employment, and because he claims he did not understand it was important to provide complete information. He did not provide the Government with a complete history of his drug abuse until he admitted at the hearing that he used cocaine in 2008. No mitigating condition applies.

Considering all relevant and material facts and circumstances present in this case, the whole-person concept, the factors listed in ¶ 6.3.1 through ¶6.3.6 of the Directive, and the applicable disqualifying and mitigating conditions, I find Applicant mitigated the drug involvement and criminal conduct allegations due to the passage of time and his continuing actions to maintain a law-abiding and drug-free lifestyle. However, he failed to mitigate the personal conduct concern because his deliberate falsifications were recent, compounded by the false information he provided to the OPM investigator, and his history of drug abuse was not fully disclosed until the hearing of this case. He has not overcome the case against him nor satisfied his ultimate burden of persuasion. It is not clearly consistent with the national interest to grant Applicant a security clearance. Guidelines H and J are decided for Applicant. Guideline E is decided against Applicant.

Formal Findings

Formal findings for or against Applicant on the allegations set forth in the SOR, as required by section E3.1.25 of Enclosure 3 of the Directive, are:

Paragraph 1, Guideline J:	For APPLICANT
Subparagraphs 1.a–c:	For Applicant
Paragraph 2, Guideline H:	For APPLICANT
Subparagraphs 2.a-f:	For Applicant
Paragraph 3, Guideline E:	Against APPLICANT
Subparagraphs 3.a–d:	Against Applicant

Conclusion

In light of all the circumstances presented by the record in this case, it is not clearly consistent with the national interest to grant or continue a security clearance for Applicant. Clearance is denied.

Henry Lazzaro
Administrative Judge

